

THE UTTON CENTER MODEL COMPACTS PROJECT

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Abstract: Interstate compacts have been used since Colonial times to resolve conflicts between states. With regard to conflicts over interstate water resources, compacts have been used for multiple purposes including water supply, water allocation, pollution control, regional planning and flood control. Virtually all of the existing interstate compacts contain provisions that are now inconsistent with the requirements of federal and state laws. This paper addresses model interstate and federal-interstate water compacts being developed for the Utton Transboundary Resources Center at the University of New Mexico School of Law.

I. Introduction

Conflicts over shared water resources have appeared repeatedly (and consistently) throughout human history. The earliest documented conflict involved diversions from the Tigris River. In 2,500 BCE, the Sumerian city-states of Lagash and Umma clashed over the right to exploit boundary channels along the Tigris. (Cooper 1983) Urlama, King of Lagash from 2,450 to 2,400 BCE, diverted water from the boundary channels in an attempt to deprive Umma of water. His son Il cut off the water supply to Girsu, a city in Umma. (Hatami and Gleick 1994)

This history is reflected in both the increasing frequency and intensity of disputes among states sharing transboundary water resources. These disputes involve the states' respective quantitative shares of such resources, water quality concerns and compliance with a variety of federal laws enacted over the past thirty years.

One of the missions of the Utton Transboundary Resources Center at the University of New Mexico School of Law is to use preventive diplomacy and multidisciplinary research to resolve such disputes. The following section of this paper presents a brief description of the establishment and function of the Utton Center. One of the more ambitious projects of the Utton

Center – preparation of model interstate and federal-interstate water compacts – is discussed in Section III.

II. The Utton Transboundary Resources Center

The Utton Center was established at the University of New Mexico School of Law in 1999 to continue the work of Professor Albert E. Utton (1931-1998) related to transboundary resource conflicts. As noted above, a primary objective of the Utton Center is the use of preventive diplomacy and multidisciplinary research to promote the equitable and sustainable management and utilization of transboundary water resources. To fulfill this objective, the Utton Center analyzes transboundary disputes, provides impartial expertise, develops multidisciplinary teams to collaborate on solutions and attempts to avoid litigation by fostering the development of sustainable transboundary resource management plans. The transboundary resource focus of the Utton Center is inclusive of all interjurisdictional boundaries including state vs. state, city vs. county, state vs. Indian tribe and country vs. country.

III. The Model Compacts Project

There are three Constitutional mechanisms to resolve interstate water disputes: (1) interstate agreements or compacts, (2) litigation in the United States Supreme Court and (3) Congressional legislation. The Supreme Court has made its position abundantly clear: States should resolve their conflicts among themselves pursuant to the compact clause of the Constitution. Such disputes are “more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.” *New York v. New Jersey*, 256 U.S. 296, 313 (1921). This

position was reaffirmed in *Vermont v. New York*, 417 U.S. 270 (1974), *Texas v. New Mexico*, 462 U.S. 554 (1983), and *Oklahoma and Texas v. New Mexico*, 501 U.S. 221 (1991). In response, the states have entered into some 26 interstate water allocation compacts, primarily in the western United States, most of them over 50 years ago. The states have also entered into a variety of interstate water supply compacts, pollution control compacts, regional planning compacts and flood control compacts.

As interstate and federal/state water conflicts have increased, so has the realization that most of the existing interstate compacts appear to be inadequate to resolve such conflicts. (Muys 2004) Consequently, the Utton Center has initiated a comprehensive project to develop two model compacts, an interstate water compact (state parties only) and a federal-interstate water compact (states and the United States as parties). This project has been undertaken by Mr. Jerome C. Muys and the author.

The methodology for the project consists of a number of discrete though closely interrelated steps:

1. The initial step has been a thorough literature review to identify and evaluate the asserted strengths and weaknesses of the use of compacts to resolve interstate water conflicts in both theory and practice.
2. The second step has been to review the language of all existing interstate water compacts and required Congressional consent legislation to ascertain how critical issues have been addressed historically. This is being supplemented with information obtained in response to a questionnaire sent to each of the interstate compact commissions on the practical administration of those compacts.
3. While these tasks have been ongoing, an Advisory Committee was selected comprised of some two dozen individuals representing a wide range of professional areas of expertise and stakeholder interests in interstate water issues.
4. The results of the earlier reviews will be complemented by several case studies, including the current efforts of the Great Lakes to identify problem areas and opportunities in the interstate compact approach and the demise of both the Apalachicola-Chattahoochee-Flint River Basin Compact, Public Law No. 105-104, 111 Statutes at Large 2219 (1997) and the Alabama-Coosa-Tallapoosa River Basin Compact, Public Law No. 105-105, 111 Statutes at Large 2233 (1997). Additional project activities that will supplement the identification of issues by the earlier reviews include an

analysis of the impact of federal environmental legislation affecting existing interstate water compacts and a review of compact litigation in the Supreme Court.

5. In March of this year, the Advisory Committee will be assembled at Bishops Lodge near Santa Fe, New Mexico, where the first interstate compact (the Colorado River Compact) was negotiated in 1922. The purpose of this meeting will be to evaluate and supplement the principal issues identified by the project study and to receive recommendations regarding specific approaches or methodologies to be included in the model compacts.

6. Following the meeting of the Advisory Committee, Mr. Muys and the author will prepare working drafts of the two model compacts which will be sent to the Advisory Committee for review. The model compacts will not be "one size fits all" proposals, but will be annotated extensively with suggestions for alternative approaches to critical issues such as compact commission membership and voting procedures, allocation methodologies, dispute resolution and adjustments to changing hydrologic data or legal requirements. Once this review has been completed, the model compacts will be modified as appropriate and distributed with commentary for public comment.

IV.

Conclusions

A primary goal of the Project is to provide a mechanism by which interstate water conflicts may be resolved in an amicable, efficient, equitable and effective manner. In addition to their applicability to interstate water conflicts within the United States, the Utton Center hopes that the model compacts may also assist in the peaceful resolution of international water conflicts.

References

- Cooper, J., 1983. *Reconstructing History from Ancient Inscriptions: The Lagash-Umma Border Conflict*. Malibu, CA: Undena.
- Hatami, H. and Gleick, P., 1994. "Water, war, and peace in the Middle East." *Environment* 36(3):6.
- Muys, J.C., 2004. "Lessons from the West: The Western States Experience with Interstate Water Issues," paper presented at the American Bar Association Conference on *Eastern Water Resources: Law, Policy and Technology*, Hollywood, FL.

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